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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1969

No. [redacted]
133

SPALDING LAUNDRY & DRY CLEANING COMPANY - - - - - - - - *Appellant*

versus

DEPARTMENT OF REVENUE, COMMONWEALTH OF KENTUCKY - - *Appellee*

On Appeal from the Court of Appeals of Kentucky

MOTION TO DISMISS OR AFFIRM

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INDEX

	Pages
I. THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE	1-3
A. The Statute	1-2
KRS 139.170	1, 2
B. The Proceedings Below	2-3
KRS 139.480 (8)	2
KRS 139.170	3
II. ARGUMENT	3-7
THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT	3-7
Caskey Baking Co. v. Virginia, 313 U.S. 117 (1941), at page 121	3
Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937), at page 509	3-4
436 S.W. 2d at page 524	4
Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959)	5
Quong Wing v. Kirkendall, 223 U.S. 59 (1912)	5-6
436 S.W. 2d at pages 523-524	6
III. CONCLUSION	7

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October Term, 1968

No. 1402

MOTION TO DISMISS OR AFFIRM

I

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A

The Statute

Kentucky Revised Statutes (Acts of the General Assembly of the Commonwealth of Kentucky, Regular Session 1960), Chapter 6, Article 1, Section 17 (b), page [illegible], exempts from the Kentucky sales and use tax "machinery for new and expanded industry."

The statute in question, KRS 139.470, defines "machinery for new and expanded industry" as "that machinery predominately in the *manufacturing* process which is incorporated for the first time into [illegible] facilities established in this state, and which [illegible] and technical machinery or such plants." (Emphasis added.)

The Proceedings Below

[illegible] Kentucky. During the year 1963 it purchased some new machinery in order to improve [illegible] claimed that this machinery was exempt from the Kentucky sales tax under KRS [illegible] which exempts "machinery for new and expanded industry." Although conceding that it was [illegible] manufacturing industries and therefore that the purchases of new machinery were not exempt under the definition of "machinery for new and expanded industry" set forth in KRS 139.470, the contention is that KRS 139.470, in restricting such machinery to that used in manufacturing, is arbitrary, unreasonable and violative of the Equal Protection Clause of the Fourteenth Amendment.

Conceding that KRS 139.470 was unconstitutional as applied to the taxpayer, the Kentucky Board of Tax Appeals refused to hold the validity of the classification

Thereafter, an appeal was made to the Jefferson Circuit Court wherein the order of the Board of Tax Appeals was reversed. Upon appeal to the Court of Appeals of Kentucky the classification was upheld as not violative of any constitutional provision.

II

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

The power of a state to classify businesses for purposes of taxation is well settled. It has the widest latitude in selecting subjects of taxation and in granting tax exemptions. In *Cooley Dickson Co. v. Virginia*, 313 U.S. 117 (1941), wherein peddlers were classified separately from other vendors, the Court said (313 U.S. at p. 124):

> "As we have repeatedly held, the equal protection clause of the Fourteenth Amendment does not prevent a state from classifying businesses for taxation or imposing different rates of taxation. Some occupations may be taxed though others are not. Some may be taxed at one rate, others at another rate. The distinctions and discrimination . . . [are] enough that those in the same class are treated with equality."

In *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937), a requirement that only employers of eight or more persons pay a percentage of their total monthly payrolls into the state Unemployment Compensation Fund was held not violative of the Equal Protection Clause. It was said (301 U.S. at p. 509):

> "This Court has repeatedly held that inequalities which result from a singling out of one particular

ticular class for taxation or exemption infringes no constitutional limitation. (Citations omitted.)

". . . A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it." (Citations omitted.)

It is evident that a service industry such as the one in the instant case is in a distinctly separate class from a manufacturing industry, not only as to function but also with respect to size, employment capacity, and financial requirements. The legislature of Kentucky passed the statute in question for the justified purpose of inducing new manufacturers to come into the state and to encourage the expansion of existing manufacturing facilities. It is neither unreasonable nor arbitrary that the legislature considered that "manufacturing" industries search for those areas in which they can benefit most under the tax laws. A "service" industry is significantly different from a "manufacturing" industry. As pointed out by the Court of Appeals of Kentucky in this case (436 S.W. 2d at p. 824):

". . . Service and other industries would normally offer a lesser potential from the standpoint of capitalization, employment, stability and extension. Manufacturing machinery produces goods which ordinarily would be subject to the sales tax, whereas service industries do not produce a taxable product. At least these are valid considerations the legislature could take into account."

Clearly a classification which separates "manufacturing" and "service" industries into different taxing

categories is founded upon a rational basis supported by public policy. As stated by the Court in *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959):

> "... It has repeatedly been held and appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment."

It is also evident that this particular classification is reasonable. In *Quong Wing v. Kirkendall*, 223 U.S. 59 (1912) the Court sustained a classification which involved a license fee on hand laundries but not on steam laundries. There the Court said (223 U.S. at p. 59):

> "The case was argued upon the discrimination between the instrumentalities employed in the same business and that between men and women. *A state does not deny the equal protection of the laws merely by adjusting its revenue laws and internal system in such a way as to favor certain industries of young or infant industries.* Like the United States, although with more restriction and in less degree, a state may carry out a policy, even a policy with which we might disagree. McLean v. Arkansas, 211 U.S. 539, 547, 53 L. ed. 315, 319, 29 Sup. Ct. Rep. 206; Armour Packing Co. v. Lacy, 200 U.S. 226, 235, 50 L. ed. 151, 156, 26 Sup. Ct. Rep. 252; Connolly v. Union Sewer Pipe Co. 184 U.S. 540, 562, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431. *It may make discriminations, if founded on distinctions that are natural grounds, not wholly unreasonable and purely arbitrary*, as was illustrated in Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 283, 292, 293, 42 L. ed. 1037, 1041, 1042, 18 Sup. Ct. Rep.